

(1) Whether the claimant sustained a personal injury by accident arising out of and in the course of his employment with the respondent.

(2) Whether timely notice was given.

(3) Whether temporary total disability should have been ordered payable from September 2, 1993, until further order, until claimant has reached maximum medical improvement or until claimant is returned to gainful employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

(1) The issues raised by the respondent in its Application for Review as to whether the claimant suffered an accidental injury; whether the injury arose out of and in the course of his employment; and whether timely notice was given are issues, if disputed, that are considered jurisdictional and subject to review by the Appeals Board. K.S.A. 44-534a(a)(2).

The Appeals Board, after reviewing the whole evidentiary record, affirms in all respects Administrative Law Judge Floyd V. Palmer's Preliminary Hearing Order for compensation dated December 21, 1993, which ordered temporary total compensation be paid to the claimant.

In proceedings pursuant to the Kansas Workers Compensation Act, the burden of proof is on the claimant to establish his right to compensation and prove the various conditions on which the claimant's right depends. K.S.A. 44-501(a). "Burden of proof" is the burden a party has to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g).

The claimant has established through his testimony and medical records admitted into evidence at the preliminary hearing held on December 21, 1993, before Administrative Law Judge Floyd V. Palmer that it is more probably true than not true that he injured his low back on July 15, 1993, when he fell off a tractor which was loaded on a trailer and struck the fender of the trailer, finally falling to the concrete pavement.

Claimant testified that on July 15, 1993, he loaded a tractor onto a trailer after preparing a new lawn for seeding and fertilizing. As he was getting off the tractor his foot got caught in the pedals of the tractor and he fell, striking his back on the trailer fender and falling to the concrete pavement. Because of the continuing pain, he contacted his family doctor, Robert L. Carnahan, M.D., on July 20, 1993, by telephone requesting medication. Dr. Carnahan's records indicate that the claimant notified the doctor he fell off a tractor on July 15, 1993, hurt his back, twisted his right ankle and injured his right elbow.

(2) The respondent also raises the issue that the claimant did not give the employer notice of the accident within 10 days after the date of accident. The Appeals Board finds, that within 10 days of July 15, 1993, the claimant did notify the respondent that he fell from the tractor and injured himself.

The claimant testified that the next day after he fell from the tractor, he personally notified Jerry Willis, the owner of J.W. Willis Contractors, of his accident and injuries. Mr. Willis testified that the claimant notified him of such accident, but indicated that he only complained of an injury to his elbow. The Appeals Board finds that from the description of the accident, as set forth by the claimant in his testimony, it is reasonable to conclude

that the claimant not only injured his elbow but also injured his back.

(3) With respect to the issue of whether temporary total disability should have been ordered in this case, the Appeals Board finds that this issue is not reviewable as the Administrative Law Judge, pursuant to K.S.A. 44-534a(a)(2), has the authority to make an award of temporary total compensation in a Preliminary Hearing Order pending a full hearing on the claim. Consequently, the Administrative Law Judge did not exceed his jurisdiction in awarding temporary total disability benefits in this matter.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer dated January 20, 1994, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Karen D. Rein, 6917 W 76th Street, Suite 101, Overland Park, Kansas 66210
Gerard E. Little, Jr., P.O. Box 1265, Lawrence, Kansas 66044
Anton C. Andersen, P.O. Box 1300, Kansas City, Kansas 66117
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director